Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

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ERASMO PEREZ-AGUILERA

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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74 pp

## QUESTION PRESENTED

Was the 1991 amendment to Rule 404(b), Fed.R.Evid., requiring reasonable notice in advance of trial met when the prosecution disclosed to the defense the name and Jencks material of an extrinsic crimes witness minutes before voir dire?

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## OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported as follows: *United States of America v. Perez-Tosta, et. al.*, 36 F.3d 1552 (11th Cir. 1994). A copy of that opinion is appended hereto in the appendix (hereinafter Pet. App.) at 1-59. A petition for re-hearing was denied on January 3, 1995 in an unpublished order. Pet. App. at 60-61. That appeal arose from a Judgment and Commitment Order entered in the trial court on October 5, 1994. Pet. App. at 62-65.

## GROUNDS FOR JURISDICTION

Certiorari review is sought from an opinion rendered by the Eleventh Circuit Court of Appeals on November 8, 1994, and the denial of a Petition for Re-hearing entered on January 3, 1995. Review is timely sought by virtue of an extension until May 19, 1995 to file this petition, granted by letter dated March 20, 1995.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is conferred under Title 28 U.S.C. §1254(1) and Rules 10.1(a) and (c) of the Supreme Court Rules. In a case of first impression, the circuit court improperly construed the notice requirement added to Rule 404(b). Jurisdiction is sought under this Court's supervisory powers to exercise discretion to overturn a departure of law by a lower court, and under this Court's jurisdiction to review

a decision by a court of appeals concerning an important question of federal law such as the construction of a new rule of evidence.

## APPLICABLE PROVISION

Federal Rule of Evidence 404(b): **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action and conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, **provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.** Federal Rule of Evidence 404(b) (emphasis supplied).

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

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Erasmo Perez-Aguilera, Defendant and Appellant in the courts below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eleventh Circuit entered in this case on November 8, 1994.

## STATEMENT OF THE CASE

### A. Introduction

The Petitioner was arrested on July 20, 1990, in Miami, Florida. A grand jury sitting in the Southern District of Florida returned an indictment on July 31, 1990, charging him and others wit. the crimes of conspiracy to possess with the intent to distribute cocaine and possession with intent to distribute cocaine. The trial spanned seven days, and concluded with a verdict of not guilty against the Petitioner on the charge of possession, and guilty on the conspiracy charge. He was sentenced on October 5, 1992 to 235 months of incarceration. On appeal to the Eleventh Circuit Court of Appeal, the court rendered an opinion on November 8, 1994, denying his request for relief. A Petition for Re-hearing was filed and denied on January 3, 1995. This petition then ensued.

## B. Facts Supporting Petitioner's Request for Review

### 1. Preamble

The Petitioner was indicted for narcotics-related charges in the Southern District of Florida on July 31, 1990. Minutes before jury selection began almost two years later, on May 26, 1992, the prosecutor handed to the defense the names of two prior bad acts witnesses, and their Jencks Act material. Defense objections were lodged under the recent amendment to Fed.R.Evid. 404(b), effective six months earlier, which required "reasonable notice in advance of trial" of extrinsic crime evidence. The district court deferred ruling until the witness was called, six days into the trial, then overruled the objection, finding the time which had elapsed provided ample "pre-trial" notice.

An appeal to the Eleventh Circuit Court of Appeals, taken under 28 U.S.C. §1291, followed the Petitioner's conviction for the one count of conspiracy to violate 21 U.S.C. §841(a)(1). In a case of first impression, the circuit court affirmed the trial court, holding the trial judge did not abuse his discretion in ruling that the prosecutor provided "reasonable notice" of a prior bad act witness.

2. Lower Court Proceedings

The investigation which led to the indictment began in December of 1989 as a part of an undercover operation led by agents of the Drug Enforcement Administration. Federal agents posed as narcotics smugglers, and offered to provide means of importing cocaine into the United States to a man known as Alzate. Discussions and meetings began in

May of that year concerning the importation of several hundred kilograms of cocaine, and eventually law enforcement officers acting in an undercover capacity received just under 500 kilograms of cocaine and stored it in a warehouse. In July of 1990, agents began negotiating with one of the conspirators, Greico, for delivery of the cocaine by hiding the drug in hidden compartments beneath the truckbeds of Ford Pick-ups which were delivered to the undercover agents by the conspirators in July. The agents were to hide the cocaine within the trucks, then leave the trucks at pre-designated sites for recovery by conspirators associated with Greico.

On July 20th, the day the cocaine was to be delivered, surveillance of Greico began early in the morning. Agents observed the Petitioner arrive at Greico's

house in an automobile, which Greico entered and began driving with the Petitioner and his brother-in-law as passengers in the vehicle. Agents surveilled the car for approximately two hours, observing Greico drive in the geographical area were the two trucks had been left for delivery. The agent's plans went awry when Greico abandoned the car, believing he was being followed, and the Petitioner took over the wheel and began driving elusively for approximately half an hour, until he was arrested. In summary, the evidence presented at the trial of this cause was the Petitioner's knowing presence in the course of a narcotics conspiracy, a prior business relationship with his brother-in-law Greico, then flight to avoid detection. The Petitioner conceded these facts at trial, but denied at trial and on appeal

that the United States had established sufficient evidence to demonstrate that, with knowledge of the activity being directed by Greico, he nevertheless voluntarily joined or participated in the illegal venture.[1] The evidence which tipped the scales toward conviction was elicited from a prior bad act witness, Raul Zaldivar, who testified that the Petitioner had been involved in prior similar criminal activity.

Notwithstanding the amendment to Rule 404(b), in effect for six months prior to the beginning of this trial, the

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[1] The Petitioner argued on appeal to the Eleventh Circuit that the evidence was insufficient against him on the charge for which he was convicted. That argument was rejected, the circuit court holding that "evidence of Aguilera's prior acts in support of Greico's organization could have legitimately reinforced the jury's findings that Aguilera was not merely a bystander, but a knowing and voluntary participant in Greico's organization." Pet.App. at 21.

Petitioner first received notice that Zaldivar would be a witness against him minutes before voir dire began. The prosecutor disclosed to defense counsel the names, plea agreements, and sentencing orders of two witnesses who would attribute against Petitioner prior criminal conduct similar to that contained in the indictment. The defense promptly objected to the late notice; the Government later conceded that its agents had known of the existence of one of the witnesses for two years, but had only learned the availability of the second witness (Zaldivar) four days before the trial was to begin.[2] An objection by the

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[2] The Government later chose to call only Zaldivar. While this strategy allowed it to claim its lateness was excusable, it had to concede that the prosecution made no effort to provide notice as to the other witness it intended to call who was known for over two years.

defense to the lack of notice was deferred by the trial court for the filing of memoranda.

After four days of trial, when the Government sought to call Zaldivar, a hearing was held on the defense objection. Arguing Rule 404(b)'s recent amendment required pre-trial notice, and citing the lack of time to prepare for the witness, to revamp its theory of defense, to investigate the background of the witness, or to seek out the existence of impeachment evidence, the defense sought to exclude the late-disclosed witness. The Government's response was that it had only learned of the availability of this witness the week before trial, and the late decision to use such a witness excused its late notice.

The district court allowed the evidence, finding that notice was in fact

pre-trial, as required by the rule, albeit only minutes before voir dire.

On appeal to the Eleventh Circuit Court of Appeal, the Petitioner contended that disclosure of Rule 404(b) material minutes before voir dire was not reasonable notice. The court of appeal held that the district court did not abuse its discretion in finding that the prosecution had provided reasonable notice of Zaldivar's testimony, holding (1) the prosecutors late notice of the availability of the witnesses testimony was excusable, (2) the defense set forth inspecific actions it would have taken given more time to prepare, and (3) the evidence was significant to the Government's case.

The circuit court erroneously focused, in the rule interpretation, on the government's reasons for late notice,

rather than whether notice was late and prejudicial to the defense. This improper legal analysis requires exercise of this Court's jurisdiction.

## REASONS FOR GRANTING THE WRIT

### I.

**THE NOTICE REQUIREMENT TO RULE 404(b), FED.R.EVID., REQUIRING REASONABLE NOTICE IN ADVANCE OF TRIAL WAS NOT MET WHEN THE PROSECUTION DISCLOSED TO THE DEFENSE THE NAME AND JENCKS MATERIAL OF AN EXTRINSIC CRIMES WITNESS MINUTES BEFORE VOIR DIRE.**

Rule 404(b) was amended, effective December 1, 1991, to add the requirement of "reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at trial." [3] The policy behind this amendment is "to reduce surprise and promote early resolution on the issue of admissibility." Fed.R.Evid. 404(b), Committee's Judiciary Note. The holding of the circuit court serves to defeat

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[3] Failure to provide pre-trial notice can be excused for good cause. That provision is inapplicable here, as the circuit court found notice was pre-trial, albeit by minutes.

these two policy objectives; this ruling will eviscerate the amendment if not quashed by this Court. Where the circuit court acknowledged in its holding that the prosecution first advised the defense of its intention to use prior crime witness evidence just minutes before voir dire, yet held that such notice was reasonably in advance of trial, it is respectfully submitted that this opinion, if left in tact, establishes a precedent which allows for trial courts to believe that the 1991 notice amendment to Rule 404(b) has been judicially repealed.

The circuit court held that this late notice was "reasonable notice in advance of trial" by applying three analytical criteria from caselaw related to other discovery notice provisions. See Pet. App. at 38. That analysis thoroughly ignored the two policy objectives stated

by Congress in its Committee notes: "to reduce surprise and to promote early resolution on the issue of admissibility." Congress amended Rule 404(b) because it perceived a need to allow citizens accused of a crime the opportunity to prepare against other crimes evidence not charged in the indictment. Extrinsic crimes evidence is often the most deadly arrow in the Government's quiver. Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 778 (1988). It allows for several arguments and inferences which negate any defense. The presumption of innocence can evaporate, as the jury substitutes the presumption of recidivism. The fabric of doubt woven in a circumstantial evidence case is torn asunder by the notion that this is not an innocent soul caught in a web of suspicious circumstances. It requires the

accused, already scrambling to defend the charge in the indictment, to redouble his efforts against the new uncharged allegations.

The Notes which accompany the promulgation of a new rule of evidence are utilized by this Court in contruing Congressional intent. See United States v. Owens, 484 U.S. 554, 108 S.Ct. 838, 99 L.Ed.2d 951 (1988). The amendment to Rule 404(b) was accompanied by the following official committee note:

> Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused. Although there are a few reported decisions on use of such evidence by the defense, see, e.g., United States v. McClure, 546 F.2d. 670 (5th Cir.1977) (acts of informant offered in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution.

> The amendment to Rule 404(b) adds a pre-trial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. See, e.g., Rule 412 (written motion of intent to offer conviction older than 10 years), Rules 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions).
>
> The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion. Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case. Compare Fla.Stat.Ann § 90.404(2)(b) (notice must be given at least 10 days before trial) with Tex.R.Evid. 404(b) (no time limit).

Several commentators have applauded the addition of this amendment, noting that its purpose was to "eliminate

surprise and promote early and thoughtful resolutions of the issue that would reduce haphazard and erroneous admission of such evidence." E. Imwinkelreid, Uncharged Misconduct Evidence, §9:06 at 324 (Cum.Supp. 1992). See also, Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report (1990), 61 Wash.U.L.Q. 1, 12. (". . . only pre-trial disclosure of such evidence will allow the defense adequate opportunity to investigate the claim of misconduct and to prepare objections to admission").[4]

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[4] The notice requirement in Rule 404(b) simply continues a decade-long progression of limiting the "poker game" element of a criminal trial. See Williams v. Florida, 399 U.S. 78 (1970) (notice of alibi); Wardius v. Oregon, 412 U.S. 471 (1973) (same); United States v. Nobles, 422 U.S. 225 (1975) (disclosure of investigator's report); Taylor v. Illinois, 484 U.S. 400 (1988) (witness list rule) (criminal trial not a poker game in which a player enjoys an absolute

The finding by the district court that notice was provided pre-trial, hence the amendment to Rule 404(b) was met, is disingenuous. Such a literal interpretation serves no purpose, and does not advance the underlying policy reasons for the amendment: to provide the defense an opportunity to prepare to meet the challenges advanced through extrinsic crimes evidence. More importantly, the district court's decision not to rule on the issue until the witness was called to the stand defeated the other foundation upon which Congress placed the amendment -- to promote the early resolution regarding the admissibility of extrinsic crimes evidence. Instead, the defense was one week into the trial without knowing

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fn. 4 (cont.)

right to conceal their cards until played).

whether the evidence would be admissible or not. This interpretation by the circuit court only promotes the Government's motive to elongate trials where its notice has been late, rather than penalize the Government for its failure to comply with the rule. Under the reasoning of the circuit court, a defendant involved in a trial that will last thirty days will never be prejudiced by late notice, whereas a defendant in a one or two day trial would have the distinct advantage of having the rule enforced. Failure to focus on the conduct of the Government, rather than the length of the trial, was erroneous.

The circuit court affirmed the district court's ruling by improperly construing the reasons for the lateness of notice, rather than the prejudice visited upon the Petitioner, which was erroneous.

The adoption by the trial court and the circuit court of this reasoning, and its review of the reasons why the notice was late, went to the prong of the rule which allows notice after trial begins upon the presentation of good cause. The district court and circuit court did not focus upon the prejudice which was visited against the Petitioner, which is the appropriate inquiry where a rule has been violated. Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

Had the court looked at the prejudice which was visited upon the Petitioner, a different result would have certainly occurred. The evidence against the Petitioner, and his brother-in-law who was a co-passenger in the car, was circumstantial. In fact, the circuit court set aside the judgment and conviction for Hernan Francisco Perez-

Tosta, finding the evidence against him insufficient. The only real difference between the evidence against the Petitioner and his brother-in-law was the extrinsic crime evidence witness Zaldivar. Had the district court properly enforced the notice requirement of Rule 404(b), and excluded the testimony of Zaldivar, a different result would have occurred in the jury's verdict. These factors were not considered by the circuit court in reviewing whether the late notice by the Government was prejudicial to the Petitioner; the failure of the court to focus upon the harm visited upon the accused by the violation of the rule was improper.

It is respectfully requested that a writ of certiorari be entered by this Court, and a review of the circuit court's opinion be undertaken by this Court. The

precedent which has been established by the circuit court has created an interpretation of a rule of evidence which, if adopted among the circuits, essentially repeals the Congressional action taken in the promulgation of the amendment to Rule 404(b). If that were to occur, the purpose of the amendment -- to reduce litigation as it pertains to the admissibility of the extrinsic crimes evidence -- will be turned on its head, and instead, litigation will be promoted. This Court has jurisdiction to review an improper interpretation of a rule of evidence. Williamson v. United States, ____ U.S. _____, 114 S.Ct. 2431, ____ L.Ed.2d ____ (1994).

## CONCLUSION

For all of the foregoing reasons, therefore, Mr. Erasmo Perez-Aguilera respectfully requests that this Court grant his petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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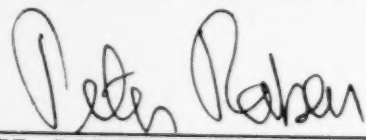
By: 

PETER RABEN, ESQUIRE
FLORIDA BAR NO. 231045

## CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was delivered by first class mail to: **SOLICITOR GENERAL**, Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530; **LINDA COLLINS HERTZ, A.U.S.A.**, Office of the U.S. Attorney, 99 N.E. 4th Street, Miami, Florida 33132; and **MARY KING, A.U.S.A.**, H.I.D.T.A. Section, Cleveland Bldg., #101, 8245 N.W. 53 Street, Miami, Florida 33166.

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**APPENDIX**

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UNITED STATES of America,

Plaintiff-Appellee,

v.

Hernan Francisco PEREZ-TOSTA,
Gustavo Javier Correa-Patino,
Erasmo Perez-Aguilera,
Luis Guillermo Rojas-Valdez,

Defendants-Appellants.

United States Court of Appeals,
Eleventh Circuit.

Nov. 8, 1994.

Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, COX, Circuit Judge, and YOUNG*[1], Senior District Judge.

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[1] *Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

COX, Circuit Judge:

Defendants Hernan Perez-Tosta (Tosta), Gustavo Correa-Patino (Correa), Erasmo Perez-Aguilera (Aguilera), and Luis Rojas-Valdez (Rojas) appeal convictions for conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 and, in Rojas's and Correa's cases, possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Because the prosecutor gave only a few minutes' pretrial notice, Aguilera challenges the district court's admission of prior bad acts evidence under Fed.R.Evid. 404(b). In addition, Aguilera, Tosta, and Rojas contend that the evidence was insufficient to support their convictions. All the appellants also raise other issues.

## I. BACKGROUND

For over a year before the arrests in this case, the Drug Enforcement Agency (DEA) conducted an undercover investigation targeting a suspected cocaine trafficker, Fernando Loaiza-Alzate (Loaiza). As part of the probe, DEA agent Joseph Giuffre offered Loaiza his services as a smuggler of shipments of Colombian cocaine from the Bahamas into South Florida. For one of these shipments, Giuffre was put in touch with Adelsis Grieco. Grieco and Giuffre planned for Grieco to have the cocaine flown from northern Colombia to the southeastern Bahamas, where the cocaine would be dropped for Giuffre's men to retrieve. After Giuffre had smuggled the cocaine into South Florida, the cocaine would be transferred to Grieco's men.

One of these transfers in Florida was to take place on July 20, 1990. Grieco's organization owned two pickup trucks equipped with concealed cargo compartments under the truckbed. Grieco was to turn the trucks over to Giuffre, who was to have the concealed compartments filled with cocaine. Giuffre would then have his people park the trucks at two southwest Miami locations that Grieco would code into Giuffre's beeper.

On July 18, 1990, Giuffre and Grieco met in a Kendall, Florida restaurant for the initial transfer of the trucks. Grieco explained the pickup's hidden compartments to Giuffre as the two of them circled the parking lot in Giuffre's car. After Grieco had told Giuffre where the trucks were, Giuffre stopped the car, and Grieco rolled down his window and whistled. Tosta appeared with an envelope

containing one of the trucks' keys, registration, and insurance papers. Tosta and Grieco exchanged a few words in Spanish and left together in Grieco's car. On July 20, 1990, the day planned for the transfer, Tosta and Aguilera arrived at Grieco's house at 10:20 a.m. in a LeBaron rented in Aguilera's name. Grieco took the wheel, and for the next hour and a half to two hours, he drove erratically around the neighborhood and up and down U.S. 1, pulling into driveways and pulling directly out again, making U-turns, and even coming to a full stop in moving traffic on U.S. 1. Agents identified this erratic driving as countersurveillance, a ploy for Grieco to determine if he was being followed. Meanwhile, around 11:00, DEA agents parked the pickups, each carrying seventy kilograms of cocaine, in two designated

shopping center parking lots on U.S. 1. Grieco's erratic route took him repeatedly back and forth past the lots where the trucks were parked.

A few minutes after DEA agents had put the cocaine-laden trucks in the lots, Rojas and Victor Manuel Estrada-Correa[2] arrived to drive the trucks to Grieco's storage sites. Rojas was led by a small brown car to Correa's house. The testimony is in conflict as to what happened at Correa's house. DEA agents testified that Rojas drove the truck into the garage and closed the garage door, only to emerge a little while later, driving the same truck without the load of

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[2] Estrada-Correa is not a party to this appeal. He was tried with the other defendants and found not guilty of possession of cocaine with intend to distribute. The jury could not reach a verdict on the conspiracy to distribute charge against him.

cocaine. Rojas testified that he never parked the truck in the garage, and that he was directed by a man to sit in Correa's living room. He did so until Correa (whom Rojas had never met) appeared, wet from the shower, and told Rojas to get out of the house. Rojas then left in the pickup he had arrived in.

As Rojas left, the DEA agents stopped the truck and arrested him. The agents immediately discovered that the cocaine was missing from the hidden compartments, and they returned to Correa's house. One agent discovered Correa with his body half out a window in the rear of the house. Correa went back in, and before agents could ram Correa's door in, Correa emerged from the open garage door in an attempt to flee. He was arrested. Agents then entered the house and discovered the cocaine in a bedroom.

Meanwhile, Grieco had observed the DEA agents' unmarked cars following the LeBaron's erratic maneuvers, and he got out of the car at a gas station on U.S. 1. Aguilera took the wheel and continued the erratic driving for another half hour to forty-five minutes, when agents stopped the car and arrested both Aguilera and Tosta.

After the arrests, Grieco and Giuffre remained in contact for a few more weeks, but Grieco was never arrested and remained a fugitive at the time of trial.

Aguilera, Tosta, Correa, Rojas, Grieco, and Estrada-Correa were all charged with one count of conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846 and one count of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). At trial, most of the law

enforcement personnel who surveilled the defendants testified as to what they saw on July 20. However, the Government did not call Agent John Shepard, the one agent who had direct visual contact with Correa's house while Rojas and Correa were inside.

In addition to the agents and officers, the Government called Luis Zaldivar, who was not a subject of this investigation, to testify that he had seen Aguilera on at least two prior occasions working for Grieco's organization. Only a few minutes before voir dire, the Government notified Aguilera's counsel that it intended to present this evidence under Fed.R.Crim.Evid. 404(b). Aguilera's counsel objected to the admission of the evidence with such short notice. At the hearing on the issue during trial, the district court concluded that because six

days had elapsed between voir dire and the day the Government planned to call Zaldivar, the notice was in fact reasonable and the testimony therefore admissible.

The jury convicted Correa, Aguilera, Tosta, and Rojas of conspiracy to distribute cocaine. Correa and Rojas were also convicted of possession of cocaine with intent to distribute. All defendants moved for judgments of acquittal both at the close of the Government's evidence and at the close of all the evidence. At the close of the Government's evidence, the district court denied Rojas's and Correa's motions and reserved ruling on the others. At the close of all the evidence, the district judge denied all the motions.

At the sentencing hearings, the district court ruled that the defendants would be held liable for all seven hundred

kilograms of cocaine that Grieco had planned to import through Giuffre. After adjustments, the court sentenced all four defendants to 235 months' imprisonment and five years' supervised release.

## II. ISSUES ON APPEAL

[1,2] Each of the four appellants raises a number of issues on appeal, and some of the issues are common to more than one appellant;[3]

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[3] In addition to the issues listed in the text, Correa contends that the district court erred in refusing to give a "missing witness" instruction to the jury. Correa's argument concerns Agent John Shepard, whom the Government did not call and who was the only agent with a direct view of Correa's house. We hold that the court did not abuse its discretion in refusing to give such an instruction. Testimony at trial from agents in radio contact with Shepard showed that Shepard's testimony was likely to be unfavorable to Correa. In this circumstance, the "missing witness" instruction is inappropriate. *See United States v. Link*, 921 F.2d 1523, 1529 (11th Cir.), *cert. denied*, 500 U.S. 958, 111 S.Ct. 2273, 114 L.Ed.2d 724 (1991).

(1) Aguilera, Rojas, and Tosta all challenge the district court's denial of their motion for acquittal, contending that the Government's evidence did not suffice to show they voluntarily participated in the conspiracy, or, in Rojas's case, to show that he knowingly possessed cocaine.

(2) Aguilera contends that the district court erred in admitting 404(b) evidence when Aguilera received notice of

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fn. 3 (cont.)

Correa also asserts that the district court violated his constitutional right to compulsory process by refusing to subpoena Agent Shepard. On the afternoon of the last day of trial, Correa requested a subpoena be issued to compel Shepard's appearance. [Tr. at 1572.] The issuance of subpoenas under Fed.R.Crim.P. 17 is within the trial court's discretion, and timeliness is one of the factors the trial court may consider. *United States v. Rinchack*, 820 F.2d 1557, 1566 (11th Cir. 1987). The district court was well within its discretion in refusing so untimely a request.

the Government's intent to offer the evidence only a few minutes before trial.

(3) Aguilera contends that the district court erroneously forbade him from cross-examining the Government's 404(b) witness on his knowledge of the sentencing guidelines.

(4) Rojas contends that he was denied effective assistance of counsel.

(5) Tosta and Rojas take issue with the district court's attribution of 700 kilograms of cocaine to them for sentencing purposes.

(6) Rojas argues that the district court erred in giving the jury a "deliberate ignorance" instruction.

**III. DISCUSSION**

A. Sufficiency of the Evidence.

Three defendants, Tosta, Aguilera, and Rojas, contend that the district court improperly denied their motions for

acquittal because the Government's evidence was insufficient to convict them. We find the evidence sufficient as to Aguilera and Rojas, but we hold that the evidence was insufficient to convict Tosta. After reviewing the relevant principles of law, we discuss each defendant in turn.

1. *Standard of Review*

[3] We review the denial of a defendant's motion for acquittal de novo. *United States v. Mieres-Borges*, 919 F.2d 652, 656 (11th Cir.1990), *cert. denied*, 499 U.S. 980, 111 S.Ct. 1633, 113 L.Ed.2d 728, (1991); *United States v. Kelly*, 888 F.2d 732, 739 (11th Cir. 1989). In considering the sufficiency of the evidence, we draw all reasonable inferences in the Government's favor. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942);

*United States v. Keller*, 916 F.2d 628, 632 (11th Cir. 1990), *cert. denied*, 499 U.S. 978, 111 S.Ct. 1628, 113 L.Ed.2d 724 (1991). For the evidence to support a conviction, it need not "exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), *aff'd on other grounds*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).

2. *Law and Analysis*

[4,5] To convict a defendant for conspiracy under 21 U.S.C. § 846, the evidence must show (1) that a conspiracy existed, (2) that the defendant knew of it, and (3) that the defendant, with

knowledge, voluntarily joined it. *E.g.*, *United States v. Sullivan*, 763 F.2d 1215, 1218 (11th Cir.1985). "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and collocation of circumstances.'" *Glasser*, 315 U.S. at 80, 62 S.Ct.at 469 (quoting *U.S. v. Manton*, 107 F.2d 834, 839 (2d Cir. 1939)); *see also United States v. Badolato*, 701 F.2d 915, 920 (11th Cir.1983). Guilt may exist even when the defendant plays only a minor role and does not know all the details of the conspiracy. *Id.*

[6,7] The Government's case against Aguilera, Tosta, and Rojas was circumstantial. Thus, reasonable inferences, and not mere speculation, must support the jury's verdict. *United States v. Villegas*, 911 F.2d 623, 628 (11th

Cir.1990), *cert. denied*, 499 U.S. 977, 111 S.Ct. 1625, 113 L.Ed.2d 722 (1991). The inference of participation from presence and association with conspirators alone does not suffice to convict. *United States v. Bell*, 833 F.2d 272, 275 (11th Cir. 1987), *cert. denied*, 486 U.S. 1013, 108 S.Ct. 1747, 100 L.Ed.2d 210 (1988). However, such an inference is permissible in evaluating the totality of the circumstances. *Id.*

a. *Aguilera*

[8] Aguilera argues that the Government failed to show that Aguilera voluntarily participated in the conspiracy. The Government's case, according to Aguilera, showed mere association and flight. Aguilera understates the Government's evidence. The Government's case against Aguilera included testimony by law enforcement

agents concerning the events on the day of his arrest, testimony by an informant about Aguilera's prior work for Grieco's organization, and documentary evidence associated with Aguilera that agents found in a search of Grieco's house.

The law enforcement agents testified for the Government that on the day of Aguilera's arrest, Aguilera arrived at Grieco's house at 10:20 a.m. in a car rented in Aguilera's name. Aguilera then rode with Grieco for nearly two hours of erratic driving that the agents considered to be countersurveillance. After Grieco observed that he was being followed and left the car, Aguilera continued to drive in the same erratic fashion until he was arrested.

The Government informant, Luis Zaldivar, testified that he had seen Aguilera performing menial tasks for

Grieco's organization on at least two prior occasions.[4] In June or July of 1988, Zaldivar met Aguilera when Aguilera showed up at Zaldivar's boat to pick up a load of cocaine for Grieco. Zaldivar also transferred cocaine to Aguilera on another occasion in late 1988 or early 1989.

Finally, the Government introduced several documents associated with Aguilera that agents found in a filing cabinet in Grieco's house. The documents included a photocopy of Aguilera's driver's license, registration papers for a boat trailer in

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[4] At trial, the jury heard that Zaldivar was a former cocaine addict and a drug trafficker serving a sentence that he could reduce only by providing substantial assistance to the Government under Fed.R.Crim.P. 35. (Tr. at 1044, 1045, 1057.) Nonetheless, in reviewing the sufficiency of the Government's evidence, we must resolve all credibility issues in favor of the Government and assume that the jury believed Zaldivar. *See United States v. Morales*, 868 F.2d 1562, 1574 (11th Cir.1989).

Aguilera's name, receipts from major purchases by Aguilera, certificates of title for a pair of jetskis owned by Aguilera, a boat registration and insurance papers showing Grieco and Aguilera as co-owners, business records for GPV International, a partnership in which Aguilera and Grieco were both partners, and a check written by Aguilera to a marina where Grieco and Aguilera's boat was docked.

This evidence supports a finding that Aguilera voluntarily participated in the conspiracy. The jury could reasonably have inferred from Aguilera's evasive driving after Grieco's exit that Aguilera was both aware of and voluntarily assisting the conspiracy. *See United States v. Morales*, 868 F.2d 1562, 1574 (11th Cir.1989) (including evasive driving by the defendant in a list of evidence

showing involvement and active participation in a drug conspiracy). In particular, the fact that Aguilera's countersurveillance effectively led law enforcement agents astray from Grieco's trail could have supported an inference that Aguilera intentionally assisted Grieco in furthering the conspiracy. The jury could also have legitimately taken into account Aguilera's relationship with Grieco, as evidenced by the presence of documents associated with Aguilera in Grieco's house, to find that a conspiracy existed between them. *Cf. United States v. Cole*, 704 F.2d 554, 557 (11th Cir. 1983) (alleged co-conspirators' status as members of an "insular" motorcycle club a factor in finding a conspiracy). Finally, evidence of Aguilera's prior acts in support of Grieco's organization could legitimately have reinforced the jury's

findings that Aguilera was not merely a bystander, but a knowing and voluntary participant in Grieco's organization. *Cf. United States v. Adams*, 799 F.2d 665, 672 (11th Cir.1986) (mere presence under suspicious circumstances coupled with a defendant's prior presence under similar circumstances enough to support conviction), *cert. denied sub nom. Morrell v. United States*, 481 U.S. 1070, 107 S.Ct. 2464, 95 L.Ed.2d 873 (1987). Thus, we affirm Aguilera's conviction.

b. *Tosta*

[9] Tosta also challenges the district court's denial of his motion for acquittal. Tosta argues that the Government's case would not support a finding beyond a reasonable doubt that Tosta knew of and voluntarily participated in the conspiracy. We agree.

The Government's evidence showed Tosta's involvement in two events. The first was on July 18, 1990, when Grieco and Giuffre met to discuss the details of the July 20 cocaine transfer and for Grieco to turn over the trucks with concealed compartments. On July 18, Tosta appeared in response to Greico's whistle and produced an open envelope containing the keys, registration, and insurance binder for one of the trucks. After handing over the envelope, Tosta and Grieco exchanged a few words in Spanish.[5] After Grieco and Giuffre concluded their meeting, Tosta and Grieco left together.

The second event was Grieco and Aguilera's countersurveillance on July 20, 1990, the day of Tosta's arrest. On that

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[5] The content of their conversation is not known because Agent Giuffre speaks no Spanish.

day, Tosta was present in the car with Grieco and Aguilera, and later just Aguilera, as Grieco and then Aguilera drove erratically over a course that took them back and forth around the sites where the cocaine-laden trucks were to be parked. Agents finally stopped the car and arrested Tosta and Aguilera. When one of the agents mentioned Tosta's actions on July 18, Tosta responded, "So, what's wrong with that?" [Tr. at 593.]

This case is very close, but the Government's case fatally lacks evidence that would support a finding beyond a reasonable doubt that Tosta voluntarily participated in the conspiracy. The sum of the inferences from the evidence is tantamount to that presented against Evasio Garcia in *United States v. Kelly*, 749 F.2d 1541 (11th Cir.), *cert. denied*, 472 U.S. 1029, 105 S.Ct. 3506, 87 L.Ed.2d

636 (1985). In *Kelly*, the Government showed that Garcia had inspected a shrimpboat that was later used to import marijuana. *Id.* at 1548. The Government also showed that Garcia had been present at a meeting of key conspirators, and that Garcia had been sitting in a parked car near the house where the offloading crew had been preparing to go and meet the shrimpboat with its load of contraband. *Id.* The *Kelly* court concluded that "all the record shows is that [Garcia] was an acquaintance of [a key conspirator.]" *Id.*

Tosta's case is very similar to Garcia's. Like Garcia, Tosta performed a facially innocent act that furthered the conspiracy's use of one of its instrumentalities. Garcia inspected the shrimpboat, and Tosta was a runner for the keys and registration papers of a truck with concealed compartment. Furthermore,

Tosta, like Garcia, was present in very suspicious circumstances. Garcia was sitting in a parked car where the smugglers were preparing to offload the marijuana; Tosta was riding in a countersurveillance vehicle near the site of a cocaine transfer.

The *Kelly* court concluded that "[a] reasonable jury could not conclude that Evasio Garcia was a co-conspirator in the importation and distribution schemes." *Id.* at 1549. Likewise, a reasonable jury could not ignore the doubts raised by the possibility that Tosta was an unwitting dupe in his sole action that furthered the conspiracy. *See United States v. Littrell*, 574 F.2d 828, 833 (5th Cir. 1978). Furthermore, in the absence of any evidence that Tosta himself was on the lookout, a reasonable jury could not infer from Tosta's mere presence in Aguilera's

rental car that Tosta was knowingly engaged in countersurveillance in furtherance of the conspiracy. *Cf. United States v. Villegas*, 911 F.2d 623, 628 (11th Cir.1990) (holding that the defendant's looking left and right in the vicinity of the defendant's brother's cocaine deal was not sufficient to show participation in the conspiracy).

Thus, we conclude that the Government's evidence was insufficient to convict Tosta of conspiracy to distribute cocaine. We therefore reverse Tosta's conviction.

*c. Rojas*

Rojas also challenges the district court's denial of his motion for acquittal on both the conspiracy and possession counts. Rojas argues that the evidence failed to show that he knowingly participated in the conspiracy and that he

knowingly possessed cocaine. We disagree. We address the conspiracy conviction first, under the rules of law discussed above.

*i. Conspiracy*

[10] In Rojas's case, the evidence was ample to show Rojas's knowingly and voluntary participation in the conspiracy. The Government showed that Rojas picked up the truck with the contraband and drove the truck to Correa's house, following a small brown car. Government agents testified that Rojas drove the truck into Correa's garage and closed the garage door. A little while later, Rojas emerged from the garage in the truck emptied of its load of cocaine. While Rojas was in the house, no one entered or left. Government agents testified that shortly after Rojas left they discovered the cocaine in a bedroom of Correa's house.

Rojas testified in his defense that he never drove the truck into the garage, which was occupied by the car of a man whose name he did not know. He was told to stay in Correa's living room. He sat there alone for twenty-five or thirty minutes. Then Correa, whom Rojas did not know, came out of the shower and told him to leave. He never saw anyone else in the house except Correa.

Circumstantial evidence suffices to show participation in a conspiracy, *see Glasser*, 315 U.S. at 80, 62 S.Ct. at 469, and the evidence here clearly supports reasonable inferences of guilt, *see Villegas*, 911 F.2d at 628. A jury could reasonably have inferred from Rojas's collection of the cocaine-laden truck and following of the little brown car to Correa's house that Rojas was voluntarily performing the task for the conspiracy.

The jury could also reasonably have inferred that the movement of seventy one-kilogram packages of cocaine from the truck to a bedroom in twenty-five minutes occurred with Rojas's knowing cooperation and assistance. Moreover, Rojas's implausible testimony itself could legitimately support an inference of guilt. *See United States v. Eley*, 723 F.2d 1522, 1525 (11th Cir.1984). Thus, we conclude that a reasonable jury could have found Rojas guilty beyond a reasonable doubt.

*ii. Possession*

[11,12] To convict Rojas for possession of cocaine with intent to distribute, the Government must show both knowing possession and an intent to distribute. *United States v. Gardiner*, 955 F.2d 1492, 1495 (11th Cir.1992). Constructive possession is sufficient, and

intent to distribute is inferable from the quantity of cocaine. *Id.* The evidence was also ample to convict Rojas on this charge. The Government showed that in twenty-five minutes seventy kilograms of cocaine moved from the truck that Rojas had driven to a bedroom in a house occupied only by Rojas and Correa. The jury could reasonably have inferred that Rojas was in possession of the cocaine during that twenty-five minutes. Moreover, the jury could have inferred an intent to distribute from the large quantity of cocaine. Thus, we conclude that the district court properly denied Rojas's motion for acquittal.

B. 404(b) Reasonable Notice

*1. Standard of Review*

[13] We review district court rulings on the admissibility of evidence under an abuse of discretion standard. *United*

*States v. Cardenas*, 895 F.2d 1338, 1342 (11th Cir.1990).

*2. Discussion*

Because the prosecutor failed to provide notice of the testimony until immediately before jury voir dire, Aguilera asserts that the district court abused its discretion in admitting prior bad acts testimony under Federal Rule of Evidence 404(b). A few minutes before jury selection on May 26, the prosecutor notified Aguilera's counsel that she intended to call two witnesses, Fernando Loaiza-Alzate and Luis Zaldivar, to testify about Aguilera's role in Grieco's earlier drug deals. (Tr. at 4.) Aguilera's counsel objected to the late notice. The district court did not immediately rule on its admissibility, asking instead for memoranda from the parties. (Tr. at 9.)

On June 1, Aguilera's counsel again raised the issue, and after a hearing the district court found that the prosecutor had not known of the potential 404(b) testimony until Friday, May 22, and that the prosecutor had notified the defense the next business day, May 26.[6] (Tr. at 939.) Because the prosecutor did not plan to call the witnesses until June 1, the court found that the defense had in fact had six days' notice. *(Id.)* The court concluded that six days' notice was reasonable under the rule, and that the prosecution had therefore satisfied the requirement. *(Id.)*

At the hearing, Aguilera called the DEA case agent, Joseph Giuffre, who testified that he had known of Loaiza's potential 404(b) testimony against

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[6] Monday, May 25, 1992 was Memorial Day.

Aguilera as early as the fall of 1990. However, Giuffre had not known of Zaldivar, or of Zaldivar's dealings with Grieco's organization, until the week before the trial, when the prosecutor learned of it. (Tr. at 953.) Ultimately, the prosecution did not call Loaiza, but did call Zaldivar. It is the admission of Zaldivar's testimony that Aguilera challenges.

Rule 404(b) was amended in 1991 to require the prosecution to provide reasonable notice in advance of trial of its intention to present 404(b) evidence, if the accused has requested the notice.[7]

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[7] The rule now reads:

> (b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes,

In this case, counsel for Aguilera had requested such notice by adopting codefendant Tosta's motion for disclosure of extrinsic evidence, which the magistrate judge granted in September, 1990. Thus, the 404(b) testimony was admissible against Aguilera only if the prosecution's notice a few minutes before voir dire constituted "reasonable notice

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fn. 7 (cont.)

> such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, **provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.**

Fed.R.Evid. 404(b) (emphasis added).

in advance of trial."[8]

The construction of 404(b)'s reasonable notice requirement is a question of first impression in this circuit.

In the particular circumstances of this case, we hold that the district court did not abuse its discretion in ruling that the prosecution had provided "reasonable notice" of Zaldivar's testimony. The policy behind 404(b) is "to reduce surprise and promote early resolution on the issue of admissibility." Fed.R.Evid. 404(b) Committee's Judiciary note. The rule imposes no specific time

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[8] Our analysis here does not concern whether the Government has shown the "good cause" that 404(b) requires for admission of 404(b) evidence during trial. *See* Fed.R.Evid. 404(b). The Government did give pretrial notice, however brief, and thus our inquiry is limited to whether this pretrial notice was reasonable. *See id.*

limits beyond requiring reasonable pretrial notice, and the Committee notes explain that "what constitutes a reasonable . . . disclosure will depend largely on the circumstances of each case." *Id.*

The Committee notes are silent as to what circumstances are relevant. To fill this gap, we analogize to other evidentiary notice provisions, such as those in the residual hearsay exceptions (Fed.R.Evid. 803(24) and 804(b)(5)), and to notice requirements imposed by discovery orders. We are mindful that the analogies cannot be taken too far, since the language of other notice requirements in the Federal Rules of Evidence is more specific than the "reasonable notice" required by 404(b). *See* Fed.R.Evid. 609(b), 803(24), 805(b)(5). Furthermore, discovery order notice requirements are

not exactly parallel because the trial judge has more discretion in fashioning a remedy for discovery violations than for failure to give notice under 404(b). *See United States v. Hartley*, 678 F.2d 961, 977 (11th Cir.1982), *cert. denied*, 459 U.S. 1170, 103 S.Ct. 815, 74 L.Ed.2d 1014 (1983); *compare* Fed.R.Crim.P. 16(d)(2) *with* Fed.R.Evid. 404(b). Despite these differences, we find that three circumstances appearing in the analogous caselaw comport with the language and purpose of 404(b).

First, in evaluating the sufficiency of evidentiary notice, courts have considered the motivations and circumstances of the party presenting the evidence. *See, e.g., United States v. Euceda-Hernandez*, 768 F.2d 1307, 1313 (11th Cir.1985) (reversing a district court's suppression of evidence not

disclosed by the prosecution under a discovery order, noting among other things that the prosecution's failure to notify was unintentional); *United States v. Bailey*, 581 F.2d 1341, 1348 (3d Cir.1978) (affirming admission of hearsay despite a lack of notice under 804(b)(5) because the declarant became unavailable only after trial began, thus making it impossible for the proponent to give earlier notice); *United States v. Iaconetti*, 540 F.2d 574, 578 (2d Cir.1976) (admitting hearsay under 803(24) despite a lack of notice when the hearsay unexpectedly became necessary for effective rebuttal), *cert. denied*, 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977). "Reasonable notice" under 404(b) should also take into account the circumstances of the prosecution's own discovery of the evidence. However, the notice requirement's purpose of

"reduc[ing] surprise" is not served by allowing mere negligence to excuse a prosecutor's failure to give notice. To protect defendants from "trial by ambush," the Government should be charged with the knowledge of 404(b) evidence that a timely and reasonable preparation for trial would have revealed.

Second, courts have focused upon the prejudice suffered by the defendant because of the lack of notice. *See, e.g., United States v. Parker*, 749 F.2d 628, 633 (11th Cir.1984) (affirming the admission of hearsay under 803(24) despite a lack of notice because the opponent of the evidence had not shown he was harmed); *United States v. Leslie*, 542 F.2d 285, 291 (5th Cir.1976) (affirming the admission of hearsay under 803(24) although the records showed no notice, because the defendant was not harmed by the lack of notice);

*United States v. Doe*, 860 F.2d 488, 492 (1st Cir.1988) (affirming admission of hearsay under 803(24) when defendants did not appear to be prejudiced by the lack of notice), *cert. denied sub nom. Andrades-Salinas v. United States*, 490 U.S. 1049, 109 S.Ct. 1961, 104 L.Ed.2d 430 (1989). Since the policy of 404(b)'s notice provision is to protect the defendant by reducing surprise, *see* Fed.R.Evid. 404(b) Committee's Judiciary note, the possibility of prejudice to the defendant from a lack of opportunity to prepare should weigh heavily in the court's consideration.

Finally, a few courts have considered the importance of the evidence to the proponent's case. *See, e.g., Euceda-Hernandez*, 768 F.2d at 1313 (reversing an order to suppress evidence not disclosed by the prosecutor under a discovery order,

noting among other things that the suppressed evidence was "extremely important to the Government's case"); *United States v. Burkhalter*, 735 F.2d 1327, 1329 (11th Cir.1984) (reversing as too extreme a sanction an order effectively suppressing evidence not disclosed under a discovery order). As in the discovery cases, the court should take into account the significance of the evidence to the prosecution's case. The second sentence of rule 404(b) is a rule of inclusion, and 404(b) evidence, like other relevant evidence, should not lightly be excluded when it is central to the prosecution's case.

[14] Thus, by analogy to other notice provisions, we can discern three factors the court should consider in determining the reasonableness of pretrial notice under 404(b):

(1) When the Government, through timely preparation for trial, could have learned of the availability of the witness;

(2) The extent of prejudice to the opponent of the evidence from a lack of time to prepare; and

(3) How significant the evidence is to the prosecution's case. We now apply these factors to the circumstances of this case.

[15] First, the district court found that the prosecutor did not know of Zaldivar's potential testimony until the Friday before trial began.[9] The case agent testified that he did not know of Zaldivar before the prosecutor did. Although the Government's failure to timely prepare for a trial would not

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[9] The trial began the following Tuesday.

excuse the lack of notice, it is clear from the record that a reasonably timely preparation for trial would not have revealed Zaldivar's possible testimony before that time. Although Zaldivar had made a statement to the DEA as early as January, 1992, Zaldivar was not part of the conspiracy in which the defendants were involved and that Agent Giuffre was investigating. Thus, it is not apparent how Giuffre would have learned that Zaldivar had made statements concerning Aguilera. In fact, Zaldivar's testimony came to the attention of the prosecutor only when Zaldivar himself telephone her.

Second, Aguilera's counsel has been vague, both during trial and in this appeal, as to what measures he might have taken, given more time, to meet the evidence. At the district court hearing on the 404(b) evidence, admissibility six

days after the prosecution had notified the defense of the 404(b) evidence, Aguilera's counsel proposed only to send out his investigator to check Zaldivar's stories. If even after six days Aguilera could point to no specific actions he might take given more preparation time, it was within the district court's discretion to conclude that Aguilera would not be prejudiced by having only six days' notice.[10]

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[10] In cross-examination of Zaldivar, Aguilera's lawyer in fact brought out that Zaldivar was a cocaine and marijuana smuggler, that Zaldivar had lied to a Customs inspector, that he did not pay taxes on his drug profits, that his testimony was part of an effort to get out of prison sooner, that he had been granted use immunity, that Zaldivar had not mentioned Aguilera during his initial debriefing, that Zaldivar was a cocaine addict, that he tested positive for marijuana when he was first incarcerated, that at the time of his arrest three state arrest warrants had been issued for him, that he had been arrested for burglary, and that Zaldivar could not remember who his last employer was. Thus, it seems

Finally, the evidence was significant to the Government's case against Aguilera. The Government's other evidence was merely that Aguilera was present in the countersurveillance car, that Aguilera later drove the car, and that papers associated with Aguilera were in Grieco's house. Zaldivar's testimony to Aguilera's prior cocaine-related work for Grieco lent strong support to a finding that Aguilera was aware of and voluntarily participated in the conspiracy. Along with the other factors, this circumstance weighs in the Government's favor.

On the record of this case, all three considerations thus weigh somewhat in favor of finding that the Government's

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fn. 10 (cont.)

likely that even if the district court erred in admitting the 404(b) evidence on such short notice, the error was harmless.

pretrial notice was reasonable. We therefore hold that the district court did not abuse its discretion in admitting the evidence.

C. Other issues

1. *Exclusion of Sentencing Cross-Examination*

[16] Aguilera contends that the district court's violation of his Sixth Amendment Confrontation Clause rights entitles him to a new trial. During cross-examination of Zaldivar, the Government's 404(b) witness, Aguilera's counsel attempted to elicit Zaldivar's understanding of the sentencing benefits he would earn by testifying for the Government.[11] On the Government's

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[11] The relevant transcript passage reads:

Q: Your initial sentence was reduced from 17.7 years to nine years, is that correct?
A: That is correct.

objection, the court admonished Aguilera's

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fn. 11 (cont.)

Q: And by testifying here today your [sic] hoping with this story to get another sentence reduction, isn't that correct.

MS. KING [prosecutor]: Objection form of the objection [sic].
THE COURT: Overruled.
THE WITNESS: Yes, that is correct.

Q: How much of a reduction, sir, do you think you're going to get out this case?
A. I don't know, sir.
Q: Sir, in federal court you serve about eighty-five percent of your sentence, do you not?

MS. KING: Objection, your Honor.
Q: So you're familiar with the guidelines?
THE COURT: Sustained.
Q: Are you familiar with the Sentencing Guidlines?
A: Yes, I am.
Q: Do you have an opinion as to how much --
MS. KING: Objection your Honor.
THE COURT: Counsel, stay away from anything having to do with any sentencing.

(Tr. at 1073-75).

counsel to "stay away from anything having to do with any sentencing." (Tr. at 1075.)

Aguilera argues that he was unable to expose Zaldivar's motive for testifying. He was thus effectively rendered unable to attack Zaldivar's credibility, in violation of his Sixth Amendment rights. *See Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). We disagree. Our reading of the transcript convinces us that Aguilera not only effectively impeached Zaldivar's credibility, but also impeached it repeatedly on the very issue of sentence reduction. (Tr. at 1065, 1074, 1078-79), Aguilera's contention is thus meritless.

2. *Ineffective Assistance of Counsel*

[17] Rojas challenges his conviction on the ground that he was denied effective assistance of counsel in violation of his

Sixth Amendment rights. It is settled law in this circuit that a claim of ineffective assistance of counsel cannot be considered on direct appeal if the claims were not first raised before the district court and if there has been no opportunity to develop a record of evidence relevant to the merits of the claim. *See United States v. Hilliard*, 752 F.2d 578, 580 (11th Cir.1985); *United States v. Lopez*, 728 F.2d 1359, 1363 (11th Cir.), *cert. denied*, 469 U.S. 828, 105 S.Ct. 112, 83 L.Ed.2d 56 (1984); *United States v. Griffin*, 699 F.2d 1102, 1107 (11th Cir.1983). Rojas did not raise ineffective assistance of counsel as a ground for his motion for new trial, and the record is not sufficiently developed to evaluate the merits of the claim. Hence, the claim is more appropriately

raised in a proceeding under 28 U.S.C. §2255. *See id.*

3. *Sentencing*

[18] Rojas also challenges his sentence.[12] In calculating Rojas's offense level, the district court attributed to Rojas 700 kilograms of cocaine, the total amount of the importation Grieco and Giuffre planned. *See* U.S.S.G. §1B1.3(a)(1) (1991); *id.* §2D1.1(c)(2). Rojas contends that seventy kilograms, the quantity hidden in the truck Rojas drove, was the appropriate amount.

The Guidelines provide that a member of the conspiracy is liable for all conduct of others in furtherance of the conspiracy that is reasonably foreseeable

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[12] Tosta makes a similar challenge, but our reversal of his conviction makes it unnecessary to address his contentions.

by the defendant. *Id.* §1B1.3(a)(1). At Rojas's sentencing hearing, Rojas did not request an individualized finding of fact as to what quantity would have been reasonably foreseeable to him, and the district court did not make one. Under these circumstances, the district court is entitled to rely upon the factual statements in the presentencing report (PSI) without making an individualized finding. *See* Fed.R.Crim.P. 32(c)(3)(D). But Rojas's PSI is at best ambiguous. It conclusorily states that "the amount of cocaine involved in this offense is approximately 700 kilograms." On that basis, the PSI fixes the offense level at 40 because the offense involves at least 500, but less than 1500 kilograms. *See* U.S.S.G. §2D1.1(a)(3), (c)(2) (1991). The PSI also states, however, that Rojas served as a "hired hand" and that it "is

doubtful that the defendant realized the quantity of contraband he was transporting . . . . " It is unclear whether this latter statement refers to the contraband on Rojas's truck or to the contraband involved in the overall conspiracy. However construed, the statement casts doubt on the propriety of attributing 700 kilograms to Rojas.

Because we find the PSI ambiguous, we conclude that no factual finding supports the quantity of cocaine attributable Rojas under the guidelines. We therefore vacate Rojas's sentence and remand for resentencing following a finding relative to the quantity of cocaine attributable to Rojas.[13]

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[13] The Government does not argue that there is a finding relative to the quantity of cocaine attributable to Rojas or that Rojas waived the objection by failing to object after sentencing. The Government's argument is rather that we

4. *Jury Instructions*

a. *Standard of Review*

[19,20] The district court has broad discretion in formulating a jury charge as long as the charge as a whole is a correct statement of the law. *United States v. Bent*, 707 F.2d 1190, 1195 (11th Cir.1983), *cert. denied*, 466 U.S. 960, 104 S.Ct. 2174, 80 L.Ed.2d 557 (1984). We will not reverse a conviction unless we find that issues of law were presented inaccurately or the charge improperly guided the jury in such a substantial way as to violate due process. *United States v. Turner*, 871 F.2d 1574, 1578 (11th

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fn. 13 (cont.)

should uphold the sentence because the record would support a finding attributing 700 kilograms to Rojas. We prefer that the district court resolve this factual dispute.

Cir.), *cert. denied*, 493 U.S. 997, 110 S.Ct. 552, 107 L.Ed.2d 548 (1989).

b. *Discussion*

Rojas contends that the district court improperly gave the jury a "deliberate ignorance" instruction.[14] We

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[14] The court instructed the jury:

> When knowledge of the existence of a particular fact is an essential part of an offense, such knowledge may be established if a defendant is aware of a high probability of its existence unless he actually believes that it does not exist.
>
> So with respect to the issue of defendants Estrada and Rojas's knowledge in this case, if you find from all evidence beyond a reasonable doubt that a defendant believed that he possessed cocaine and deliberately and consciously tried to avoid learning that there was cocaine and deliberately and consciously tried to avoid learning of its presence in order to be able to say, if he should be apprehended, that he did not know cocaine was on or about his person, you may treat such deliberate avoidance, if so found, of positive knowledge as the equivalent of knowledge.

agree. However, we find that the error was harmless. A "deliberate ignorance" instruction is appropriate when "the facts . . . support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution." *United States v. Rivera*,

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fn. 14 (cont.)

> In other words, you may find that a defendant acted knowingly if you find beyond a reasonable doubt either that the defendant actually knew that he possessed cocaine or, two, that he deliberately closed his eyes to what he had every reason to believe was the fact.
>
> I must emphasize, however, that the requisite proof of knowledge on part of the defendant cannot be established by merely demonstrating that he was negligent, careless or foolish.

(Tr. at 1774-75).

944 F.2d 1563, 1571 (11th Cir.1991) (quoting *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir.1987)). "[A] district court should not instruct the jury on 'deliberate ignorance' when the relevant evidence points only to *actual knowledge*, rather than deliberate avoidance." *Id.* (emphasis in original).

In *Rivera*, the defendants were arrested while attempting to bring three false-bottomed suitcases into the country with cocaine in the false bottoms. *Id.* at 1565. In its analysis of the appropriateness of the instruction, the court pointed out that the defendants had not indicated in any way their awareness of the unusual construction of their suitcases and their avoidance of positive knowledge of the contents. *Id.* at 1572. Nor was there any evidence that the defendants had acquired their suitcases

under suspicious circumstances, but that the defendants deliberately avoided confirming their suspicions. *Id.* Thus, to contend that the instruction was appropriate because the defendants should have known they were carrying cocaine "skate[d] dangerously close to [urging] a negligence standard." *id.*

[21] In Rojas's case, the evidence likewise pointed to actual knowledge rather than deliberate avoidance. The relevant evidence was that Rojas drove one of the cocaine-laden trucks to Correa's house and was present while seventy kilograms of cocaine were taken off the truck and placed in a bedroom of the house. The inference of knowledge based on this evidence is that Rojas, being present during such a large movement of cocaine, had to have been aware of it. No evidence suggests that Rojas strongly

suspected cocaine but "purposely contrived" not to learn about it. *See id.* at 1572. Hence, giving the instruction was error.

[22] However, as in *Rivera*, we find that the error was harmless. *Id.* at 1572-73. The Government's evidence, though circumstantial, very strongly supported a finding that Rojas knew of the cocaine. The jury could easily have based its verdict on a finding of actual knowledge, rather than deliberate ignorance. We therefore affirm Rojas's convictions.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the convictions of Correa, Rojas, and Aguilera. However, we REVERSE Tosta's conviction, and we VACATE Rojas's sentence and REMAND for resentencing.

AFFIRMED in part; REVERSED in part; VACATED and REMANDED in part.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 92-4781

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HERNAN FRANCISCO PEREZ-TOSTA,
GUSTAVO JAVIER CORREA-PATINO,
ERASMO PEREZ-AGUILERA,
LUIS GUILLERMO ROJAS-VALDEZ,

Defendants-Appellants.

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On Appeal from United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING

BEFORE: TJOFLAT, Chief Judge, COX, Circuit Judge, and YOUNG* Senior District Judge.

PER CURIAM:

The petitions for rehearing filed by appellants GUSTAVO JAVIER CORREA-PATINO, ERASMO PEREZ-AGUILERA and LUIS GUILLERMO ROJAS-VALDEZ are DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

*Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

v.

JUDGMENT IN A CRIMINAL CASE

ERASMO PEREZ-AGUILERA,
#42075-004

CASE NUMBER:
90-6120-CR-MOORE(5)

William D. Matthewman, Esq.
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____.
[X] was found guilty on count(s) TWO after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section

21:846

Nature of Offense

Conspiracy to possess with intent distribute five kilograms or more of cocaine

Date Offense Concluded

7/20/90

Count Number(s)

Two

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The defendant has been found not guilty on count(s) Seven, and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.
[X] It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) Two, which shall be due

[X] immediately [ ] as follows

**IT IS FURTHER ORDERED** that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: NONE

Defendant's Date of Birth: 1/22/55

Defendant's Mailing Address:

October 2, 1992
Date of Imposition of Sentence

/s/
Signature of Judicial Officer

K. MICHAEL MOORE/U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

October 2, 1992
Date

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO HUNDRED & THIRTY-FIVE (235) MONTHS.

[X] The Court makes the following recommendations to the Bureau of Prison:

confinement in an institution in the southeastern region of the United States.

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply wit the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall

comply with the following additional conditions:

If deported, the period of supervised release shall remain non-reporting. The Defendant shall not reenter the United States without the permission of the Attorney General.

**FINE**

The defendant shall pay a fine of $25,000.00. The fine includes any costs of incarceration and/or supervision.